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No. 88-1512

In The

Supreme Court of the United States

October Term, 1988

ALBERT J. FERENS and
MARGARET L. FERENS, his wife,

Petitioners,

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONERS

STANLEY V. OSTROW, ESQ.
RICHARD B. TUCKER, III, ESQ.*
WILLIAM A. PENROD, ESQ.
TUCKER ARENSBERG, P.C.
1200 Pittsburgh National Building
Pittsburgh, Pennsylvania 15222
(412) 566-1212

Counsel for Petitioners,
Albert J. Ferens and
Margaret L. Ferens, his wife

**Counsel of Record for Petitioners*

CECILE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Whether a district court to which a case has been transferred pursuant to 28 U.S.C. §1404(a) is obligated to apply the state law that would have been applied if there had been no transfer where the transfer is from a court having proper venue and jurisdiction and the transfer has occurred as the result of an unopposed motion by the plaintiff.

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For The Third Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit issued November 25, 1988, upon the rendering of the judgment to be reviewed is reported at 862 F.2d 31 and appears in Petitioners' Petition For A Writ Of Certiorari as Appendix A at page A-1. The Order of this Court entered on June 27, 1988, vacating the previous judgment of the Third Circuit and remanding the case to the Third Circuit for further consideration is reported at ___ U.S. ___, 108 S.Ct. 2862 and appears in Petitioners' Petition For A Writ Of Certiorari as Appendix B at page A-17. The prior Opinion of the Third Circuit dated May 28, 1987, is reported at 819 F.2d 423 and appears in Petitioners' Petition For A Writ Of Certiorari as Appendix C at page A-18. The Opinion of the United States District Court for the Western District of Pennsylvania is reported at 639 F. Supp. 1484 and appears in Petitioners' Petition For A Writ Of Certiorari as Appendix D at page A-34.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on November 25, 1988. The Order of the United States Court of Appeals for the Third Circuit denying the Petitioners' timely Petition For Rehearing And For Rehearing En Banc was entered on January 5, 1989. Petitioners' Petition For A Writ Of Certiorari was timely filed on March 15, 1989. The Petition was granted on May 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Miss. Code Ann. §15-1-49 (1972) provides:

> All actions for which no period of limitations is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

42 Pa. C.S.A. §5524(2) (Purdon 1981) provides:

> The following actions and proceedings must be commenced within two years:
>
> • • • •
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

STATEMENT OF THE CASE

Petitioners, Albert J. Ferens and Margaret L. Ferens, are residents of Pennsylvania (J.A. 8,13,31). In July of 1981, Mr. Ferens purchased a John Deere #6620 Combine in Uniontown, Pennsylvania, for use on his farm (J.A. 9,14,21,32). The combine had been manufactured by Respondent, John Deere Company, a/k/a Deere & Company[1], a Delaware corporation with its principal place of business in Illinois (J.A. 8,9,13,14,21). In addition to doing business in Pennsylvania, Respondent was also engaged in business in Mississippi, where it was registered with the Secretary of State and maintained a local registered agent (J.A. 13,21).

On July 5, 1982, Mr. Ferens was injured in Pennsylvania while cleaning his combine (J.A. 9,14,32). His right hand became caught in the rotating auger and was severed above the wrist (J.A. 9,14,32).

In July of 1985 the Petitioners initiated two lawsuits against the Respondent (J.A. 1,3). One lawsuit was filed in the United States District Court for the Western District of Pennsylvania alleging breaches of express and implied warranties of merchantability and fitness for use (hereinafter "the Warranty Action") (J.A. 1,8-12), for which the applicable Pennsylvania statute of limitations was four years. *See* 13 Pa. C.S.A. §2725 (Purdon 1984) and 42 Pa. C.S.A. §5525 (Purdon 1981). The other lawsuit was filed in the United States District Court for the Southern

[1] The names of all parties to the proceedings in the Court of Appeals are contained in the caption of the case in this Court.

District of Mississippi alleging negligence and strict liability in tort (hereinafter "the Tort Action") (J.A. 3,13-19), for which the applicable Mississippi statute of limitations was six years. *See* Miss. Code Ann. §15-1-49 (1972). Federal court subject matter jurisdiction for both lawsuits was based upon diversity of citizenship pursuant to 28 U.S.C. §1332 (J.A. 8-9,14).

With respect to the Tort Action, the Respondent did not object to either venue or the exercise of in personam jurisdiction over it by a Mississippi court. Instead, the Respondent filed an answer denying liability and raising various affirmative defenses, including applicable statutes of limitations (J.A. 20-25).

Thereafter, on October 2, 1985, the Petitioners moved to transfer the Tort Action to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404(a) (J.A. 3,26-30). The Respondent did not oppose the transfer; and on November 8, 1985, the motion was granted (J.A. 3,34-35).

In the Western District of Pennsylvania the Tort Action and the Warranty Action were consolidated for all purposes (J.A. 1,4,39). On February 20, 1986, the Respondent filed motions for summary judgment as to all claims in both lawsuits, asserting that the claims raised in the Tort Action were barred by Pennsylvania's two-year statute of limitations applicable to negligence and strict liability causes of action (J.A. 1,4,40-42). *See* 42 Pa. C.S.A. §5524(2) (Purdon 1981). The District Court agreed and granted summary judgment as to the Tort Action claims only (J.A. 1,4,43-44). *Ferens v. Deere & Co.*, 639 F. Supp. 1484 (W.D. Pa. 1986), *aff'd*, 819 F.2d 423 (3rd Cir. 1987),

vacated and remanded, ___ U.S. ___, 108 S.Ct. 2862 (1988), *aff'd on remand*, 862 F.2d 31 (3rd Cir. 1988). Final judgment was entered with respect to these claims as the result of the Petitioners' subsequent motion pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (J.A. 1-2,4-5,45-48, 49-50).[3]

The Petitioners appealed to the United States Court of Appeals for the Third Circuit (J.A. 6). The Third Circuit initially affirmed the District Court in a 2-1 panel decision which concluded that the United States Constitution required the application of Pennsylvania's statute of limitations no matter where the case was brought (J.A. 6). *Ferens v. Deere & Co.*, 819 F.2d 423 (3rd Cir. 1987), vacated and remanded, ___ U.S. ___, 108 S.Ct. 2862 (1988). However, this Court granted certiorari and vacated and remanded in light of its Opinion in *Sun Oil Co. v. Wortman*, ___ U.S. ___, 108 S.Ct. 2117 (1988) (J.A. 6). *Ferens v. Deere & Co.*, ___ U.S. ___, 108 S.Ct. 2862 (1988). On remand, the Third Circuit again affirmed the District Court in a 2-1 panel decision (J.A. 7). *Ferens v. Deere & Co.*, 862 F.2d 31 (3rd Cir. 1988). In its Opinion on remand the Court concluded that Pennsylvania's two-year statute of limitations was properly applied to bar the Petitioners' Tort Action because the Petitioners had transferred the case to Pennsylvania. The Petitioners thereafter filed a timely motion for rehearing and for rehearing en banc which was denied on January 5, 1989 (J.A. 7).

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[3] The breach of warranty claims in the Warranty Action were stayed pending the outcome of the Petitioners' appeal (J.A. 49-50).

On March 15, 1989, Petitioners filed their petition for a writ of certiorari with this Court. On May 15, 1989, their petition was granted.

SUMMARY OF ARGUMENT

Following the plaintiff-initiated transfer of the Tort Action pursuant to 28 U.S.C. §1404(a), the District Court in Pennsylvania was obligated to apply the state law that would have been applied if there had been no transfer and the case had been tried in the Southern District of Mississippi where Mississippi's six-year statute of limitations would have resulted in the denial of any motion for summary judgment based upon the statute of limitations. The District Court and the Third Circuit erred by applying Pennsylvania's two-year statute of limitations.

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), this Court concluded that Section 1404(a) should be regarded as a federal judicial housekeeping measure which simply authorizes a change of courtrooms and not a change in the applicable state law. Although *Van Dusen* did not involve a plaintiff-initiated transfer, the transferor state's law should be applied following plaintiff-initiated transfers as well. The purpose of Section 1404(a) is to allow federal civil suits to be transferred, in the interest of justice, to the most convenient forum. This remedial purpose is available to plaintiffs as well as defendants; and nothing in Section 1404(a) or its legislative history justifies its use to defeat the state-law advantages accruing from a plaintiff's exercise of his right to choose a proper forum.

Applying these principles, a majority of courts have correctly concluded that where the transferor court was a proper forum, the law of the transferor state should continue to apply after a Section 1404(a) transfer regardless of whether the plaintiff or the defendant is the moving

party. In reaching a contrary result, the Third Circuit majority erroneously relied upon decisions involving transfers from courts where jurisdiction or venue was improper. In the present case venue and jurisdiction were proper in the Southern District of Mississippi; and, accordingly, the District Court should have applied Mississippi law.

The Third Circuit majority apparently based its contrary decision upon its perception that the Petitioners were guilty of impermissible forum shopping. This perception is incorrect. Petitioners had a right to select the forum with the most favorable law, so long as it was a proper forum. Their motion to transfer was not improper forum shopping because Petitioners had already properly obtained the advantages of the more favorable Mississippi law. Their motion simply sought to make the trial of the case more convenient for all the parties and witnesses and a more efficient utilization of judicial resources, the very purposes for which Section 1404(a) was enacted.

Because the Petitioners properly selected the Southern District of Mississippi as their forum, the subsequent transfer of their lawsuit pursuant to Section 1404(a) cannot be used by Respondent to defeat the advantages accruing to the Petitioners from the proper exercise of their venue privilege. Accordingly, the Third Circuit's judgment should be reversed.

ARGUMENT

I. The Transferee District Court Was Obligated To Apply The Law Of The Transferor State Following The Transfer Of The Case Upon The Unopposed Motion Of The Petitioners

The Petitioners, who were the plaintiffs in the District Court, successfully moved to have the Tort Action transferred from the Southern District of Mississippi to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404(a). Section 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The critical issue in this case is whether the District Court in Pennsylvania, following the plaintiff-initiated transfer pursuant to Section 1404(a), was obligated to apply the state law that would have been applied if there had been no transfer and the case had been tried in the Southern District of Mississippi.

It is undisputed that had the Tort Action been tried in the Southern District of Mississippi, the federal court there would have applied Mississippi's six-year statute of limitations, Miss. Code Ann. §15-1-49 (1972)[3]; and any

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[3] At present Miss. Code Ann. §15-1-49 (1972) provides:

> All actions for which no period of limitations is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

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motion for summary judgment by the Respondent based upon a statute of limitations argument would have been denied. *See Ferens v. Deere & Co.*, 862 F.2d 31, 34 (3rd Cir. 1988). Under the *Erie* doctrine the District Court in Mississippi, sitting in a diversity action, would have applied the law of the state in which the Court was located. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *See also Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945) (state statutes of limitations are applicable in federal diversity cases). This application of state law would have included Mississippi's conflicts of laws rules. *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941); *King v. Otasco, Inc.*, 861 F.2d 438, 441 (5th Cir. 1988).

In choice of law situations Mississippi applies its own statute of limitations to actions brought in Mississippi even though they are otherwise governed by the substantive law of another state. *See Williams v. Taylor Machinery, Inc.*, 529 So.2d 606, 609 (Miss. 1988); *Shrubrooks v. A.C. and S., Inc.*, 529 So.2d 557, 566 (Miss. 1988); *Vick v. Cochran*, 316 So.2d 242, 246 (Miss. 1975); *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 665-666, 131 So. 84, 88 (1930). *See also King v. Otasco, Inc.*, 861 F.2d at 441.[4] Thus, the District Court in Mississippi would

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The Mississippi legislature has now enacted legislation which will, effective July 1, 1989, amend Miss. Code Ann. §15-1-49 by reducing the limitations period to three years with respect to causes of action accruing on or after July 1, 1989. *See* H.B. 1171, Reg. Sess., 1989 Miss. Laws, §§3,7,8.

[4] In *Sun Oil Co. v. Wortman*, ___ U.S. ___, 108 S.Ct. 2117, 2121 (1988), this Court recently upheld the constitutionality of such a practice.

have applied Mississippi's six-year statute of limitations in the present case.[5]

After the transfer, however, the District Court in Pennsylvania elected to apply the law of the transferee state, in particular, Pennsylvania's two-year statute of limitations applicable to negligence and strict liability causes of action. *See* 42 Pa. C.S.A. §5524(2) (Purdon 1981).[6] Because the Tort Action was barred by the Penn-

[5] Although Mississippi has a "borrowing statute" relating to causes of action which have accrued in some other state and cannot be maintained there because of the lapse of time, *see* Miss. Code Ann. §15-1-65 (1972), the courts in Mississippi have consistently held that this statute applies only to a non-resident who moves to Mississippi after the statute has run on the cause of action in the other state. *See Williams v. Taylor Machinery, Inc.*, 529 So.2d at 609; *Shrubbrooks v. A.C. and S., Inc.*, 529 So.2d at 565-566; *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. at 667, 131 So. at 88. *See also Cowan v. Ford Motor Co.*, 719 F.2d 785, 786 (5th Cir. 1983); *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009, 1011 (5th Cir. 1969). The Mississippi legislature has also amended Miss. Code Ann. §15-1-65, effective July 1, 1989, with respect to causes of action accruing on or after July 1, 1989. *See* H.B. 1171, Reg. Sess., 1989 Miss. Laws, §§4,7,8.

[6] The Pennsylvania statute, 42 Pa. C.S.A. §5524(2) (Purdon 1981), provides:

> The following actions and proceedings must be commenced within two years:
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> • • • •
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

sylvania statute of limitations, the District Court granted Respondent's motion for summary judgment. *Ferens v. Deere & Co.*, 639 F. Supp. 1484, 1492 (W.D. Pa. 1986), *aff'd*, 819 F.2d 423 (3rd Cir. 1987), *vacated and remanded*, ___ U.S. ___, 108 S.Ct. 2862 (1988), *aff'd on remand*, 862 F.2d 31 (3rd Cir. 1988). Accordingly, the Pennsylvania District Court's decision to apply the law of the transferee state, rather than the law of the transferor state, was fatal to the Petitioners' Tort Action. The District Court's decision, however, is inconsistent with this Court's reasoning in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), and contrary to the vast weight of authority.

In *Van Dusen* the defendants sought to transfer to the District of Massachusetts forty wrongful death actions brought in the Eastern District of Pennsylvania by the personal representatives of certain victims of an airline accident which had occurred in Massachusetts. In interpreting the "interest of justice" portion of 28 U.S.C. §1404(a), this Court was required to determine which state law would apply if a transfer were to occur. After a careful analysis, this Court stated:

> We believe, therefore, that both the history and purposes of §1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms. [footnote omitted]

Van Dusen v. Barrack, 376 U.S. at 636-637. Because Section 1404(a) deals only with the placement of litigation, and

not the law to be applied, the Court concluded that in cases such as the one before it,

> . . . the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under §1404(a) generally should be, with respect to state law, but a change of courtrooms. [footnote omitted]

Id., 376 U.S. at 639. *See also Cowan* v. *Ford Motor Co.*, 713 F.2d 100, 104 n.6 (5th Cir. 1983) (if case is transferred on defendant's motion, Mississippi statute of limitations would still apply); *Schreiber* v. *Allis-Chalmers Corp.*, 611 F.2d 790, 792-793 (10th Cir. 1979) (Mississippi statute of limitations would be applied in case transferred to Kansas). *Cf. Stewart Organization, Inc.* v. *Ricoh Corp.*, ___ U.S. ___, 108 S.Ct. 2239, 2245 (1988) (a transfer pursuant to §1404(a) does not carry with it a change in the applicable law).

In refusing to apply the state law of the transferor state, as was required in *Van Dusen*, the Third Circuit emphasized that *Van Dusen* involved a transfer sought by the defendants and noted that this Court limited its holding in *Van Dusen* to defendant-initiated transfers. *See Ferens* v. *Deere & Co.*, 862 F.2d at 34-35. While it is true that this Court reserved judgment on whether the same considerations would govern a plaintiff-initiated transfer, *see Van Dusen* v. *Barrack*, 376 U.S. at 640, the Court's reasoning and analysis are equally compelling in requiring the application of the transferor state's law regardless of which party is seeking the transfer.

The purpose of Section 1404(a) is to allow federal civil suits to be transferred, in the interest of justice, to the most convenient forum.

> Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice. [footnote omitted]

Van Dusen v. *Barrack*, 376 U.S. at 616.

> The idea behind §1404(a) is that where a "civil action" to vindicate a wrong - however brought in a court - presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court.

Continental Grain Co. v. *Barge FBL-585*, 364 U.S. 19, 26 (1960), quoted with approval in *Van Dusen* v. *Barrack*, 376 U.S. at 622.

This remedial purpose is available to a plaintiff as well as a defendant. *See Coffey* v. *Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986); *Philip Carey Mfg. Co.* v. *Taylor*, 286 F.2d 782, 784 (6th Cir.), *cert. denied*, 366 U.S. 948 (1961); 1A(Pt.2) J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, *Moore's Federal Practice*, ¶ 0.345[4.-2] (2d ed. 1989). Nothing in Section 1404(a) provides for a change of the applicable law when the case is transferred by a plaintiff rather than a defendant. The Section simply provides for a change of venue "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. §1404(a).

> There is nothing . . . in the language or policy of §1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a

forum which, although it was inconvenient, was a proper venue.

Van Dusen v. Barrack, 376 U.S. at 633-634.

> [The] legislative background [of §1404(a)] supports the view that §1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court. The legislative history of §1404(a) certainly does not justify the rather startling conclusion that one might "get a change of law as a bonus for a change of venue." [footnote omitted]

Id., 376 U.S. at 635-636.

Although this Court reserved judgment in *Van Dusen* on the application of these principles to plaintiff-initiated transfers under Section 1404(a), several of the circuit courts have addressed the issue. Except for the Third Circuit, these courts have correctly concluded that where the transferor district court was a proper forum, the law of the transferor state should continue to apply after the transfer. *See Martin v. Stokes*, 623 F.2d 469, 471 (6th Cir. 1980); *In re Bendectin Litigation*, 857 F.2d 290, 306 (6th Cir. 1988), *cert. denied sub nom. Hoffman v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 109 S.Ct. 788 (1989) (following *Martin v. Stokes* with respect to plaintiff-initiated transfers); *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982, 991 n.14 (11th Cir. 1982). *Cf. Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221, 1224 (7th Cir. 1984), *superseded*, 752 F.2d 295 (7th Cir. 1985).[9]

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[9] *The Gonzalez case involved a plaintiff-initiated transfer pursuant to 28 U.S.C. §1404(a). In its original opinion the*

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Martin v. Stokes, supra, contains a comprehensive review of the applicable law following transfers under both 28 U.S.C. §1404(a) and its companion section, 28 U.S.C. §1406(a), governing transfers where venue is improper. The Court concluded that the applicable law following a transfer does not depend on whether the transfer is made on the motion of the plaintiff or defendant, but does depend upon whether the transfer is pursuant to Section 1404(a) or Section 1406(a). *Id.*, 623 F.2d at 471. In reaching this conclusion, the Court noted that Section 1404(a) applies to actions brought in proper but inconvenient courts. *Id.*, 623 F.2d at 471. The Court reasoned that since a transfer under Section 1404(a) represents only a change in courtrooms for the convenience of the litigants and witnesses, it should not affect the state law governing the action. *Id.*, 623 F.2d at 472.

The Court also noted the goal of identity or uniformity between federal and state courts sought by *Erie R. Co. v. Tompkins*, *supra*, and its progeny, and the conclusion reached in *Van Dusen* that in applying these principles to Section 1404(a), the critical identity to be maintained was

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Court, citing Martin v. Stokes, supra, and Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc., supra, held that when a plaintiff has exercised his choice of forum in the first instance by selecting a permissible forum, the state law of that forum should govern the action regardless of which party initiates a transfer. 734 F.2d at 1224. However, the Court subsequently issued a second opinion superseding its original opinion and deciding the case on other grounds. 752 F.2d 295. Consequently, the question of the effect on the applicable law of a plaintiff-initiated transfer under Section 1404(a) is unresolved in the Seventh Circuit. Coffey v. Van Dorn Iron Works, 796 F.2d at 221 n.6.

between the federal district court which decides the case and the courts of the state in which the action was filed. *Martin v. Stokes*, 623 F.2d at 472-473. The Court then correctly reasoned as follows:

> By determining the choice of law solely on the basis of the nature of the transfer, a result is reached that is consistent both with *Van Dusen* and the *Erie* doctrine. Once a plaintiff has exercised his choice of forum by selecting a permissible forum, the state law of that forum should govern the action, regardless of the wisdom of the plaintiff's selection. Thus, no matter who seeks to transfer the action to a more convenient forum under §1404(a), the state law of the forum in which the action was originally commenced remains controlling. In this manner, the outcome in the transferee district court will be the same as the outcome would have been in the state courts of the state where the action was originally brought.
>
> Accordingly, we conclude that the choice of law is dependent on the nature of the transfer. If an action is transferred under §1404(a), the state law of the transferor court should be applied.

Id., 623 F.2d at 470. *See also In re Air Crash Disaster at Washington, D.C. on January 13, 1982*, 559 F. Supp. 333, 340 n.5 (D. D.C. 1983); *In re Richardson-Merrell, Inc.*, 545 F. Supp. 1130, 1135 (S.D. Ohio 1982); *Alexander v. Richardson-Merrell, Inc.*, 541 F. Supp. 93, 99 (S.D. N.Y. 1982); 1A(Pt.2) J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, *Moore's Federal Practice*, ¶ 0.345[4.-5] (2d ed. 1989); Note, *Choice of Law in Federal Courts after Transfer of Venue*, 63 Cornell L. Rev. 149, 154-159 (1977). *Cf.* 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, §3846 (2d ed. 1986) (recognizing that courts are increasingly applying the law of the transferor court if that court was proper in terms of venue and personal jurisdiction).

The Ninth Circuit, without reference to whether the transfer was initiated by the plaintiff or the defendant, has simply concluded that where a case is transferred for the convenience of the parties pursuant to Section 1404(a), the transferee court must apply the law of the transferor court. *See Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983). *See also Ross v. Colorado Outward Bound School, Inc.*, 822 F.2d 1524, 1527 (10th Cir. 1987); *Manley v. Engram*, 755 F.2d 1463, 1467 n.10 (11th Cir. 1985); *Truck Insurance Exchange v. Tetzlaff*, 683 F. Supp. 223, 225 (D. Nev. 1988); *RPJ Sportswear, Inc. v. Xylo Tex, Ltd.*, 681 F. Supp. 225, 227 (S.D. N.Y. 1988); *Western Smelting & Metals, Inc. v. Slater Steel, Inc.*, 621 F. Supp 578, 581 (N.D. Ind. 1985); *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1086 (S.D. N.Y. 1984); *Subacz v. Town Tower Motel Corp.*, 567 F. Supp. 1308, 1316 (N.D. Ind. 1983). *Cf. Bott v. American Hydrocarbon Corp.*, 441 F.2d 896, 899 (5th Cir. 1971) (where the transfer originates in a suggestion by the court and with the concurrence of the defendant and no objection by the plaintiff, the law of the transferor court is applied); *Schuman v. Mezzetti*, 702 F. Supp. 52, 53-54 (E.D. N.Y. 1988) (where the parties stipulate to a transfer pursuant to Section 1404(a), the law of the transferor court is applied).

Those cases cited by the Third Circuit majority in *Ferens* as supporting the application of the law of the transferee court after a plaintiff-initiated transfer under Section 1404(a) involved situations where jurisdiction or venue in the transferor state appeared to be improper. *See*

Carson v. *U-Haul Co.*, 434 F.2d 916, 918 (6th Cir. 1970)[8]; *Parham* v. *Edwards*, 346 F. Supp. 968, 971-972 (S.D. Ga. 1972), *aff'd per curiam*, 470 F.2d 1000 (5th Cir. 1973). Section 1404(a) applies to actions which have been brought in a permissible forum. *See Martin* v. *Stokes*, 623 F.2d at 471. It is therefore appropriate that the law of an improper transferor court not be applied after a transfer. Otherwise, a plaintiff could gain the advantage of the law of a state where he could not have maintained his lawsuit by filing the lawsuit there and then transferring it to a state where venue and jurisdiction were proper, but the law was less favorable. *See Roofing & Sheet Metal Services, Inc.* v. *LaQuinta Motor Inns, Inc.*, 689 F.2d at 991-992; *Ellis* v. *Great Southwestern Corp.*, 646 F.2d 1099, 1110 (5th Cir. 1981); *Reyno* v. *Piper Aircraft Co.*, 630 F.2d 149, 165 (3rd Cir. 1980), *rev'd on other grounds*, 454 U.S. 235 (1981).[9]

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[8] The *Carson* case was distinguished by the Sixth Circuit in its subsequent opinion in *Martin* v. *Stokes*, 623 F.2d at 472 n.4, on the basis that the transferee court lacked jurisdiction. The Court, however, also overruled any inference in *Carson* that the applicable law depended upon whether the plaintiff or the defendant was seeking the transfer: "While some authorities . . . have emphasized the importance of the party seeking the transfer, [citations omitted], we believe that the more appropriate emphasis is on the nature of the transfer." *Id.*, 623 F.2d at 472.

[9] The District Court in *Ferens* also relied upon the American Law Institute's *Study Of The Division Of Jurisdiction Between State And Federal Courts* (1969) which proposed legislation including a requirement that the transferee court apply the transferee court's law following all plaintiff-initiated transfers. The proposal did not distinguish between cases in which the original court was a proper or improper forum. Congress has thus far been as unwilling to impose such a requirement on

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In the present case, however, venue and jurisdiction were *proper* in the Southern District of Mississippi.[10] The

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plaintiff-initiated transfers as have the majority of courts considering the issue. The revisions proposed by this study were introduced in Congress in 1971, S. 1876, 92d Cong., 1st Sess., 117 Cong. Rec. 15071 (1971), and reintroduced in 1973, S. 1876, 93d Cong., 1st Sess., 119 Cong. Rec. 16658 (1973), but have never been enacted.

[10] The Respondent never challenged either venue or the exercise of in personam jurisdiction over it by the District Court in Mississippi; and, indeed, any such challenge would clearly have been unsuccessful. At the time the suit was filed, venue over a corporation was appropriate in any judicial district in which the corporation was licensed to do business or was doing business. *See* 28 U.S.C. §1391(c) (amended effective February 17, 1989). In its answer in the Tort Action, the Respondent admitted that it was doing business in Mississippi, was registered with the Secretary of State of Mississippi, and maintained a local registered agent in Jackson, Mississippi (J.A. 21). Mississippi law at the time provided that a foreign corporation doing business in Mississippi was subject to suit in Mississippi to the same extent that Mississippi corporations were, regardless of whether the cause of action accrued in Mississippi or not. *See* Miss. Code Ann., §79-1-27 (1972) (repealed effective January 1, 1988). *See also* Miss. Code Ann., §79-3-229 (1972) (repealed effective January 1, 1988). In *S. & W. Construction Co.* v. *Douglas*, 244 Miss. 498, 506, 142 So.2d 33, 34 (1962), the Mississippi Supreme Court held that under Mississippi law, a Mississippi state court had jurisdiction to hear a case involving a nonresident plaintiff injured in another state suing a foreign corporation which, however, had qualified to do business in Mississippi and had appointed a resident agent for service of process. *See also Shrubrooks* v. *A.C. and S., Inc.*, 529 So.2d at 559; *Poole* v. *Mississippi Publishers Corp.*, 208 Miss. 364, 380, 44 So.2d 667, 673 (1950); *Cowan* v. *Ford Motor Co.*, 694 F.2d 104, 105-106 (5th Cir. 1982); *Schreiber* v. *Allis-Chalmers Corp.*, 611 F.2d at 793.

better-reasoned rule and the overwhelming weight of authority recognize that where the original forum is a proper one, a convenience transfer by the plaintiff under Section 1404(a) should carry with it no change in the applicable law.[11] Accordingly, the District Court should have applied the Mississippi statute of limitations and denied Respondent's motion for summary judgment.

II. The Petitioners' Utilization Of The Transfer Statute To Transfer The Case Did Not Constitute Impermissible Forum Shopping

In holding that the District Court correctly applied the Pennsylvania statute of limitations, the majority in the Third Circuit apparently based its decision on its perception that the Petitioners' actions constituted impermissible forum shopping. As this Court recognized in *Van Dusen*, however, federal law gives a plaintiff the right to select the forum with the most favorable law so long as it is a proper forum in which the case may be brought. *See Van Dusen v. Barrack*, 376 U.S. at 632-635. *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981); *Ferens v. Deere & Co.*, 862 F.2d at 35; *Headrick v. Atchison, T. & S. F. Ry. Co.*, 182 F.2d 305, 309 (10th Cir. 1950). Indeed, this Court not only recognized a plaintiff's venue privilege, but deemed it deserving of protection from defendants seeking to use Section 1404(a) to defeat the state-law

[11] The application of such a rule will also benefit the efficient administration of the federal court system because plaintiffs will not be deterred from initiating transfers for purposes of consolidation with other pending cases arising out of the same or a related set of facts.

advantages accruing therefrom. *See Van Dusen v. Barrack*, 376 U.S. at 633-635.

In the present case, the Southern District of Mississippi was a proper forum. Both jurisdiction and venue were undeniably proper; and the Petitioners were, therefore, clearly entitled to select Mississippi as their forum and gain the advantages of that state's favorable laws.[12] The Petitioners' proper exercise of their right to select a favorable forum cannot constitute improper forum shopping.

Nor was their motion to transfer improper forum shopping.[13] Forum shopping necessarily implicates some attempt to select a forum with a more favorable procedural or substantive law. *See Ferens v. Deere & Co.*, 862

[12] Indeed, as Judge Seitz recognized in his dissent, the Petitioners had no choice but to file suit in Mississippi because of the pertinent statutes of limitations. *See Ferens v. Deere & Co.*, 862 F.2d at 37 (Seitz, J., Dissenting).

[13] After the Petitioners filed their motion to change venue, Respondent did not file any affidavit or response opposing the motion as constituting improper forum shopping or arguing that it would be improper to apply Mississippi's statute of limitations if the case were transferred to Pennsylvania. Of course, had Respondent done so and convinced the Court in Mississippi to deny the motion, the Petitioners would still have had a forum, albeit an inconvenient one, in which to try their case. By not opposing the transfer and then seeking to have the case dismissed in Pennsylvania because of Pennsylvania's statute of limitations, Respondent has essentially used a Section 1404(a) transfer to defeat the state-law advantages which had accrued to the Petitioners from the proper exercise of their venue privilege. *Van Dusen* teaches that such a use of Section 1404(a) is improper. *See Van Dusen v. Barrack*, 376 U.S. at 633-636.

F.2d at 37 (Seitz, J., Dissenting). *Cf. Van Dusen* v. *Barrack*, 376 U.S. at 636 (if a change of law were in the offing, parties might use Section 1404(a) as a forum-shopping device). The Petitioners, however, had already obtained the advantage of the most favorable law by properly selecting Mississippi as their forum. The Petitioners could have proceeded to trial on the merits in Mississippi without being barred by the statute of limitations. Their transfer of the case to Pennsylvania provided them with no better law, either procedurally or substantively. Rather, it simply made the trial of the case more convenient for all the parties and witnesses and a more efficient utilization of judicial resources. Providing for the trial of the case in a more convenient forum is the very purpose for which 28 U.S.C. §1404(a) was enacted. Its use by the Petitioners for that very purpose, when the resulting transfer did not provide them with a more advantageous law, cannot under any circumstances be construed as inappropriate forum shopping.

It is instead the rule announced by the majority in *Ferens* which will result in a plaintiff's being able to use 28 U.S.C. §1404(a) as a forum shopping device to obtain the application of more favorable law. As the majority acknowledges, its construction of Section 1404(a) will allow a less diligent plaintiff who has filed his lawsuit in a forum with less favorable law to utilize Section 1404(a) to obtain the advantages of the more favorable law of another forum by initiating a transfer. *See Ferens* v. *Deere & Co.*, 862 F.2d at 36. *See also Martin* v. *Stokes*, 623 F.2d at 472.

In the present case the Petitioners *properly* selected the Southern District of Mississippi as their forum for the

Tort Action, thereby obtaining the state-law advantage of Mississippi's six-year statute of limitations. The subsequent transfer of the Tort Action to the Western District of Pennsylvania pursuant to the Petitioners' unopposed motion to transfer[14] cannot be used by the Respondent to defeat the advantages accruing to the Petitioners from their proper exercise of the privilege of selecting a forum. No change of law can result from the change of venue. To hold otherwise, as the Third Circuit did, is to ignore this

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[14] There is no question but that the Tort Action met the statutory requirements for a transfer pursuant to 28 U.S.C. §1404(a) because the transfer was clearly for the convenience of the parties and witnesses and in the interest of justice. As the affidavit accompanying the Petitioners' motion for a change of venue demonstrated, all witnesses with any knowledge of the accident or injuries resided in the Western District of Pennsylvania and all documents relating to the injuries were also located there (J.A. 32). The Respondent filed no counter affidavit or other opposition claiming any inconvenience or prejudice from a transfer to Pennsylvania. In fact, the transfer also convenienced the Respondent because both parties would be able to reduce their legal expenses by consolidating the Tort Action and the Warranty Action which were based on essentially one set of facts (J.A. 28). The "interest of justice" component of a Section 1404(a) transfer analysis relates to the efficient administration of the court system. *Coffey* v. *Van Dorn Iron Works*, 796 F.2d at 221. In the present case the ability to consolidate the two lawsuits and to have the case tried by a federal judge familiar with the applicable substantive law of Pennsylvania also favored transferring the case to Pennsylvania. *Cf. Van Dusen* v. *Barrack*, 376 U.S. at 643-646; *Coffey* v. *Van Dorn Iron Works*, 796 F.2d at 221. Thus, a transfer was unquestionably appropriate under 28 U.S.C. §1404(a). Of course, since the Respondent did not oppose the Petitioners' motion for a change of venue or seek review of the transfer order, the propriety of the transfer order is not in issue.

Court's admonition that the federal courts should "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." *Van Dusen v. Barrack*, 376 U.S. at 638.

The Petitioners' Tort Action would not have been barred by the statute of limitations in the courts of Mississippi where the lawsuit was filed. The Respondent cannot be permitted to utilize the transfer to Pennsylvania, which was accomplished for the convenience of the parties and witnesses and in the interest of justice, to achieve a different result.

CONCLUSION

For the foregoing reasons the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

Stanley V. Ostrow, Esq.
Richard B. Tucker, III, Esq.
William A. Pennock, Esq.
Tucker Arensberg, P.C.
1200 Pittsburgh National Bldg.
Pittsburgh, PA 15222
(412) 566-1212

Counsel for Petitioners, Albert J. Ferens and Margaret L. Ferens, his wife

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